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JAMES H. McKENNEY,
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No. 308.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

JOHN W. BALLMANN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

MOTION TO ADVANCE.

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v.
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MOTION TO ADVANCE.

Comes now the Solicitor-General, on behalf of the United States, and moves the court to advance this case for hearing during the present term.

It is unnecessary to state the facts in the case other than to say that this is a writ of error sued out to review the judgment of the District court in the contempt proceeding which is now before the court on habeas corpus in *Ballmann* v. *Fagin*, argued on May 8 last.

In order that, if the Government shall prevail in the habeas corpus proceeding, the grand jury at Cincinnati may continue its investigation of the matter before it when the alleged contempt arose, and not be delayed by the pendency of the writ of error, it is desired that this case be advanced, so that it may be disposed of at the same time as the habeas corpus case.

10403—05

It is believed that the briefs in the habeas corpus case discuss substantially all the questions presented on this writ of error, and the Government is willing to submit the case, if advanced, on the briefs already on file. If opposing counsel file an additional brief, it would desire an opportunity to reply, if so advised.

Notice of this motion has been served and proof of service filed with the clerk.

H. M. Hoyt,
Solicitor-General.

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vs.

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ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

BRIEF FOR THE PLAINTIFF IN ERROR.

Printed by JAMES BARCLAY, 108-118 Canal St., Strobridge Building, Cincinnati, Ohio.

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STATEMENT AND ASSIGNMENT OF ERRORS.

Ballmann's proceeding in habeas corpus, now under submission on appeal (No. 627 October term, 1904), presents the question whether the judgment of the district court, committing him for contempt, is void. This writ of error presents the question whether it is erroneous.

We rely upon the following errors assigned in the petition for the writ:

1. That the order entered April 10, 1905, as of April 7, requiring Ballmann to produce all books and papers within his control, is repugnant to the fourth and fifth amendments of the Constitution of the United States.

2. That the order of April 8, requiring him to answer certain questions concerning his ledger, which had been obtained from him by means of a judicial proceeding, is repugnant to section 860 of the Revised Statutes of the United States.

3. That the judgment committing him for contempt for refusing to answer said questions, notwithstanding his claim that an answer thereto might tend to criminate him, is repugnant to the fifth amendment of the Constitution of the United States and to section 860 of the Revised Statutes of the United States.

4. That there was no legal evidence to support the finding in the order of April 8th that he had said cash book in his possession or under his control and that he had knowingly failed and refused to produce it before the grand jury.

5. That the judgment and orders committing him for contempt were made without any legal evidence to support them and are beyond the power or jurisdiction of the court and are null and void.

6. That the court erred in refusing to grant his motion to be discharged on the ground that no legal evidence of contempt had been offered and that no legal charge had been preferred against him.

7. That no legal charge of contempt was preferred against him, or legal proceeding to punish him for contempt instituted against him, and that the court was without jurisdiction to render judgment or to make any of said orders.

8. That the judgment and proceedings are without due process of law and null and void.

9. That the court refused him a reasonable opportunity to secure counsel and prepare for the hearing, and required him to proceed without a specific information and without due process.

10. That the judgment and the order of commitment are illegal and void, because they are indefinite and uncertain, and because the punishment inflicted is indeterminate, and in violation of the Constitution and laws of the United States.

11. That the court erred in receiving the following evidence:

(a) The testimony of George F. Dieterle as to defendant's testimony before the grand jury concerning a cash book, viz:

"Q. Will you state what he [Ballmann] said with reference to a cash book being used in his business during the months of December, 1904, and January and February and March and up to April 6, 1905?

A. The question was asked, and he said there was no such book to his knowledge."

(b) The defendant's ledger, and accounts No. 133 and 140 thereon, being Exhibits H. and I. which ledger had been obtained from him by means of a judicial proceeding, and in using the same against him in this proceeding.

(c) The testimony of Clements and of Hunt and of Kramer concerning said ledger.

(d) The testimony of Clements that said ledger was posted from a cash book and that it showed folios of a cash book, and that certain figures thereon indicated pages of a cash book and that other figures thereon indicated cash slips, viz: the

figures 382 in account No. 133, Exhibit I., and that certain entries on said ledger were in defendant's handwriting, viz: the entries under date of January 26, 27 and 30, 1905, in account No. 140, Exhibit H.

(e) The testimony of Hunt that said ledger was in defendant's office on April 6 and 7, 1905, and that the witness made entries thereon on April 5th or 6th, 1905, and the meaning of said entries and of the word folio, and other words and figures on said ledger.

(f) The testimony of Clements that a cash book was used in the conduct of defendant's business.

(g) The testimony of Clements that a cash book was used for the purpose of posting the ledger in defendant's office.

(h) Evidence of what the witnesses Clements, Kramer and Hunt testified before the grand jury, and particularly what they testified before the grand jury concerning said ledger and the meaning of figures thereon, and concerning a cash book and the contents and use thereof.

(i) Other hearsay and incompetent testimony.

(j) The testimony of Clements, Hunt and Kramer concerning books other than those called for by the subpoena of April 7, 1905.

(k) In permitting the district attorney to examine said witnesses as upon cross-examination, and to impeach their testimony.

ARGUMENT.

We refer to the pages of the printed record in Ballmann, Appellant, vs. Fagin, No. 627, October term, 1904. The

proceedings in the district court are incorporated into that record (pp. 17-48) and have therefore by stipulation been omitted in printing the record in this case.

Ballmann was committed by the district court (1) for refusing to answer two questions, and (2) for failing to produce a cash book. His excuse for refusing to answer the questions was that an answer might criminate him and that he was therefore protected from answering by the fifth amendment of the Constitution of the United States. We submit that question, which also arises on this writ of error, on our brief and argument in Ballmann vs. Fagin, and confine this brief to questions arising upon Ballmann's failure to produce a cash book, and to errors of the district court in receiving evidence in disregard of section 860 of the Revised Statutes.

I.

The specifications were in writing, and did not charge contempt in failing to produce any books except those called for by the subpoena of April 7.

It will probably be conceded that in a criminal proceeding, based on written charges, the inquiry is confined to those charges.

In In re Reese, 107 Fed. 942, 948 (C. C. A. 8th Cir.), the court, after quoting from the decisions of this court and of other courts, in which it is held that a proceeding for contempt is in the nature of a criminal proceeding, and to be governed by the rules of construction which prevail in criminal cases, said:

"It follows from these well recognized principles that the petitioner was entitled to be informed of the nature and cause of the accusation against him, and to be tried on the charge as made, and on no other charge."

The court of appeals in that case affirmed the order of the

circuit court discharging Reese on habeas corpus, on the ground that the contempt for which he had been committed was not charged in the motion for commitment. The court of appeals said that the trial court had "no authority on that motion to punish him for some other offense not therein charged against him."

In Parkhurst vs. Kinsman, 2 Blatchf. 76; Fed. Cas. No. 10759, the circuit court for the southern district of New York held that in proceedings in contempt for disobedience of an injunction the proofs "must be limited to the particular offences alleged against the defendant."

The charges filed on April 7 are found at p. 18 of the record and are as follows:

"The grand jury for the April term (1905) respectfully represents to your honor and charges that John W. Ballmann is guilty of contempt of court in this, to-wit: that upon the 7th day of April, A. D. 1905, *a subpoena in due form* was served upon said John W. Ballmann, commanding him to appear forthwith before this court and said grand jury, to give testimony concerning a certain matter then under investigation before said grand jury, and to produce at said time and place the cash books, ledgers, letter press copy books and sheets *showing the transactions as conducted under the name of A. Smith and A. Johnson with said John W. Ballmann*, during the months of December, 1904, and January and February, 1905.

Said John W. Ballmann appeared before said grand jury *in obedience to said subpoena*, but failed, and still fails and refuses to produce before said grand jury the *aforesaid* books and papers.

The said papers and books are material to an investigation being conducted before said grand jury."

The only charge was that Ballmann failed to obey the subpœna of April 7. No other process had been served on him.

The charges filed on April 8, are found at p. 19 of the record and are as follows:

"The grand jury for the April term (1905) respectfully represents to your honor and charges that John W. Ballmann is guilty of contempt of court, in this, that

Whereas on the seventh day of April, A. D. 1905, said Ballmann was duly served with subpoena to appear before this court and this grand jury, to give testimony in a certain matter then under investigation and pending before said grand jury, and being required *by said subpoena* to produce a *certain* cash book in use in his business, did, on the seventh day of April and also upon the eighth day of April, 1905, being still under the process of this court, and in contempt of the order of this court, and for the purpose of interfering with the due administration of justice of said court and in said grand jury investigation, wilfully fail and refuse to produce *said* cash book," etc.

What follows relates to the refusal of the witness to answer the two questions

Disobedience of the subpoena of April 7 was the only charge made. Disobedience of the omnibus order of April 7 requiring Ballmann to produce all books and papers pertaining to his business, which is found at pp. 18 and 19 of the record, was not charged, and could not have been intended, for that order was not entered until April 10, and was not made until after the filing of the first contempt charges. It was not known to the grand jury.

The Government's evidence was also confined to the failure to produce "a cash book which was called for by his subpoena." It is as follows, Rec. 27:

"Q. Mr. Dieterle, state whether or not on yesterday, in the investigation before the grand jury, Mr. Ballmann produced a cash book *which was called for by his subpoena?*

A. He did not.

Q. Will you state whether or not, on this morning, before

said grand jury, he produced said cash book *which he was called upon to produce in his subpoena?*

A. He did not."

The order of April 8, at p. 20 of the record purports to be based upon the written charges:

"The charges of contempt presented by the grand jury upon the eighth day of April, 1905, came on to be heard upon the evidence and the arguments of counsel, and after due consideration the court finds that the said John W. Ballmann is guilty of contempt of the process and orders of this court, *as charged in said information filed by said grand jury*, in the following particulars, to-wit:

First. That the said John W. Ballmann has knowingly failed and refused to produce to and before said grand jury a *certain* cash book used by him in the conduct of his business, and which said cash book is in his possession or under his control.

Second. That said John W. Ballmann has wilfully refused to answer before said grand jury certain questions material to an examination pending before said grand jury, with reference to said cash book, as is specifically charged in the information filed against him.

Wherefore, it is considered, ordered and adjudged by the court that said John W. Ballmann produce the *said* cash book," etc.

It is thus seen that the written charges of contempt, the Government's testimony, and the order of April 8, all relate to books called for by the subpoena of April 7.

II.

The subpoena of April 7 was confined to books and papers "showing transactions under the name of A. Smith and A. Johnson."

The solicitor general does not dispute this proposition. At page 2 of his brief in the habeas corpus appeal, after saying that Ballmann's examination before the grand jury was "to

bring out the relations to his establisment of a supposed speculative customer passing under the names of A. Smith and A. Johnson," he adds:

"The subpoena (issued April 7) required him to produce a cash book among other documents *showing transactions under those names.*"

Again at p. 37 he says:

"The subpoena directed Ballmann to bring his books, including the cash book, *showing accounts in certain names.*"

The subpoena is at p. 43 of the record. It requires Ballmann "to bring cash book, ledger, letter press copy books and all sheets showing transactions under the name of A. Smith & A. Johnson during months of Dec. 1904 & Jan. & Feb. 1905."

There was a suggestion, at the oral argument of the appeal, that the words "showing transactions, etc." qualified only the words "letter press copy books and all sheets." But that is an unnatural and strained construction. The grand jury were evidently investigating transactions *under certain names, during certain months,* and called for "cash book, ledger, letter press copy books and all sheets," relating to transactions under those names during those months. They did not call for anything else. If the words "showing transactions under the name of A. Smith and A. Johnson" do not qualify "cash book and ledger," neither do the words "during months of Dec. 1904 and Jan. and Feb. 1905," and there is no specification whatever of the cash book and ledger required. The subpoena would be void for indefiniteness.

In Privett vs. Presley, 62 Ind. 491, the appellant had been committed for failing to comply with an order of the court requiring him to deliver to the sheriff "all the goods covered by the mortgage of the plaintiff received by him from Thomas W. Harris, or account to the plaintiff for the value

thereof." The supreme court of Indiana discharged the appellant on habeas corpus, saying, p. 494:

"The goods which the appellant was thus ordered to deliver were not described or identified, nor was their value stated. A judgment in such terms, would as we think, be a nullity. The order in question is not less so. Nothing material is settled by it. The question what goods the appellant received from Thomas W. Harris is left open and undetermined. Perhaps the appellant knew what goods he received from Harris; but is the knowledge of the appellant to be relied upon to aid this defect in the order? Might there not be a dispute or controversy as to what goods were thus received by the appellant, and might it not be claimed that there were more goods thus received than there really were?

III.

There was no evidence that Ballmann ever had any book "showing transactions under the name of A. Smith and A. Johnson."

This proposition is not disputed.

In our brief in Ballmann vs. Fagin we have discussed the further proposition that there was no evidence, sufficient to justify a finding in a criminal proceeding, that Ballmann had *any* cash book in his possession, when the subpoena of April 7 was served on him. But we consider that question immaterial. The only book called for was one "containing transactions under the name of A. Smith and A. Johnson." Wilful failure to produce a book answering that description was the only charge with which Ballmann was confronted, and we need not inquire whether he had some other book.

IV.

Ballmann purged the contempt as to the book, under oath.

In Rex vs. Sims, 12 Mod. 511, the court said:

"If one brought in, in contempt, deny all upon oath, he is of course, discharged of the contempt; but if he has forsworn himself, he may be prosecuted for perjury."

Blackstone, after saying that the rule in proceedings in contempt in equity is that the sworn answer of the party charged with contempt may be contradicted and disproved *by affidavits of the adverse party*, adds:

"Whereas in the courts of law the admission of the party to purge himself by oath is more favorable to his liberty, though perhaps not less dangerous to his conscience; for, if he clears himself by his answers, the complaint is totally dismissed." 4 Bl. Com., 286, 287.

Rapalje, after quoting the foregoing passage from Blackstone, says:

"The doctrine thus laid down is still the rule followed by courts which proceed according to the common law, those courts uniformly holding that if one accused of a constructive contempt fully answers all the charges, on his oath, he must be discharged; the answer must be taken as true, and extrinsic evidence can not be received to impeach it." Rapalje on Contempt, sec. 119.

United States vs. Dodge, 2 Gall. 313; Fed. Cas. No. 14,975, was a process of attachment before Mr. Justice Story and district judge Duval for a contempt of the respondent in forcibly rescuing a prisoner in the custody of the marshal. The court said:

"We can not receive any collateral evidence as to the offence, but if the respondent, by his affidavit, and answers on oath to interrogatories proposed by the district attorney, discharges himself of the contempt, no further proceedings can be had against him on the attachment. If, from any collateral evidence, it should appear that there is reason to believe the respondent has perjured himself, we will recognize him to answer, at the next term of the court, to such matters as may be found against him. See, as to contempts and

practice thereon. Vin. Abr. "Contempts." A., B; Prac. Reg. 99, 100; Gilb. Com. Pl. 20, 21; 12 Mod. 511; Mod. Cas. 73; Com. Dig. "Chancery," D. 3; Salk. 321; 4 Bl. Comm. 283; Rex vs. Horsley, 5 Term R. 362; 3 Hawk. P. C. bk. 2, c. 22, secs. 1, 32-34; 1 W. Bl. 640; Wyatt's Reg. 138; 2 Burrows, 796; Doug. 516; Bac. Abr. 'Attachment,' B."

In In re Pitman, 1 Curt. 186; Fed. Cas. No. 11,184. Mr. Justice Curtis said:

"Now one of the most important privileges accorded by the law to one proceeded against as for a contempt, is the right to purge himself, if he can, by his own oath. So rigid is the common law as to this, that it does not allow the sworn answers of the respondent to be controverted, as to matter of fact, by any other evidence. U. S. vs. Dodge [Fed. Cas. No. 14,975]. 'If the party can clear himself upon oath he is discharged.' 4 Bl. Comm. 286, 287."

The cases are considered and the doctrine approved by circuit judges Caldwell and Thayer in Boyd vs. Glucklich, 116 Fed. 131, 140, 141.

The district court, before passing sentence on Ballmann, was duly advised by the foreman of the grand jury that Ballmann made the following answer in writing to and in the presence of the grand jury:

"I have not now and neither at the time nor at any time since the service of the first subpoena upon me in this matter have I had in my possession or under my custody or control the book referred to in the order of the court entered on April 8, 1905, or any book showing transactions under the name of A. Smith or A. Johnson, and am unable to produce the same." Rec. 22.

V.

The District Court erred in receiving evidence in contravention of Section 860 of the Revised Statutes of the United States.

The section is as follows:

"No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture."

In Tucker vs. United States, 151 U. S. 164, 168, it was held that "discovery" or "evidence," within the meaning of section 860, includes facts or papers which a witness is compelled to produce or disclose by subpoena, interrogatory, or other judicial process, and that the section is conceived in the same spirit as the fifth amendment.

The following evidence was received, in violation of the section:

1. The testimony of foreman George F. Dieterle as to defendant's testimony before the grand jury concerning a cash book, viz:

"Q. Will you state what he [Ballmann] said with reference to the cash book being used in his business during the months of December, 1904, and January and February and March and up to April 6, 1905?

A. The question was asked, and he said there was no such book to his knowledge." Rec. 27.

The testimony was not received for the purpose of proving that Ballmann had failed to produce a cash book. Dieterle had already testified to that fact. Rec 27. It was offered, and received, for the purpose of comparing Ballmann's testimony before the grand jury with the testimony of his clerks at the trial in the district court, concerning the existence and

use of a cash book, in order to discredit him, and to show that he was guilty of subterfuge. But his testimony before the grand jury could not be used for that purpose under section 860.

2. Ballmann's ledger, having been obtained from him by means of a judicial proceeding, could not be used against him in the contempt proceeding. But the court used entries in it against him for the purpose of proving the existence of a cash book, and received the testimony of Clements and Hunt and Kramer concerning those entries for the same purpose.

Clements was permitted to testify, over the defendant's objection, that the ledger was posted from a cash book (Rec. 28, 29, 31), and that it showed folios of a cash book (Rec. 29, 31), and that certain figures thereon indicated the pages of a cash book (Rec. 29, 30), and that other figures thereon indicated cash slips, to-wit: the figures 382 in Account No. 133 (Rec. 29, 30), and that certain entries on the ledger were in defendant's handwriting, to-wit: the entries under date of January 26, 27, and 30, 1905, in account No. 140, shown at p. 44 of the record. Rec. 31, 32.

Hunt was permitted to testify that the ledger was in defendant's office on April 6 and 7, 1905 (Rec. 39), and that the witness made entries thereon on April 5 or 6, 1905, and the meaning of those entries and of the word folio, and other words and figures on the ledger. Rec. 39, 40.

Section 860 forbade the use of his ledger, obtained from Ballmann under the order of April 7, or of the testimony of witnesses improperly offered by the Government concerning entries thereon. Ballmann objected to its introduction as evidence and duly excepted. Rec. 41.

We call attention also to the course of the district attorney in offering evidence, clearly incompetent, of what his witnesses had testified before the grand jury concerning Ball-

mann's books (Rec. 30, 34, 35, 36, 37, 39). The court not only received this testimony, but itself put the following question to the Government's witness Kramer (Rec. 36):

"What did you tell the grand jury?"

VI.

The Defendant was denied a reasonable opportunity to prepare for the trial, with the assistance of counsel.

It appears from the bill of exceptions that Ballmann was taken from the grand jury room directly into court. The proceedings open with his appeal for delay until he could get counsel. Rec. 25. He had not been served with process or with a copy of the charges against him. The judge ordered the grand jury to retire and announced that he would "hear this application as soon as Mr. Ballmann can get his counsel here." Rec. 25. Counsel appeared and requested "that the charges made against John W. Ballmann be shown to him," and the court graciously granted time for counsel "to examine the complaint." Counsel requested time to prepare and to get his witnesses. The court did not consider witnesses necessary, and refused an adjournment until the afternoon to allow counsel to examine the law of the case. He was evidently forced to trial without an opportunity to do more than to read the complaint hurriedly.

This was not the due process of law which the fifth amendment prescribes, nor the "assistance of counsel for his defense" which the sixth amendment guarantees.

In Boyd vs. Glucklich, 116 Fed. 131, 134 (C. C. A. 8th Cir.), the court said:

"Dispatch in judicial proceedings is commendable, but, in proceedings involving the liberty of a citizen, he has a right not only to be informed of the precise claim against him, but, after receiving that information, he has a right to

a reasonable time to prepare his answer and present his proofs, and, lastly, to be heard by counsel on the law and facts of the case. While proceedings in bankruptcy may be summary, they should not be too summary; in other words, they should not be so summary as to deprive the bankrupt of those fundamental rights and privileges that belong to every citizen, among which are the right to be advised of the demand made upon him, and the right, after being so advised, to have a reasonable time to prepare his defense and produce his witnesses. The bankrupt act does not do away with these rights, and no citizen forfeits them by being adjudged a bankrupt. The bankrupt act contemplates that proceedings in bankruptcy shall go forward with all reasonable dispatch compatible with the due and orderly administration of justice and a proper regard for the fundamental rights of the citizen."

VII.

The Court has jurisdiction of the writ of error.

The court itself allowed the writ. A judgment of conviction in contempt proceedings may be reviewed on writ of error. Bessette vs. W. B. Conkey Company, 194 U. S. 324. The case involves the construction and application of the Constitution of the United States and was therefore properly brought directly to this court. Motes vs. United States, 178 U. S. 458.

We respectfully submit that the judgment of the district court should be reversed.

LAWRENCE MAXWELL, JR.,
THOMAS F. SHAY,
MILLER OUTCALT,
Counsel for the Plaintiff in Error.